Supreme Court, U. S.
FILED
JUL 19 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1652

MARTIN HAROLD HODDER, et. al.,
Petitioners,

v

UNITED STATES NUCLEAR REGULATORY COMMISSION, et. al.,
Respondents

and
FLORIDA POWER & LIGHT COMPANY,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY

MARTIN H. HODDER
1131 N.E. 86th Street
Miami, Florida 33138
(305) 751-8706

TERENCE J. ANDERSON
University of Miami School of Law
Coral Gables, Florida 33134
(305) 284-2253 or 2971

Attorneys for Petitioners.

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PETITIONERS' REPLY

Both respondents concede, as they must,[1] that the Commission has applied the "interim guidance" in nuclear licensing proceedings throughout the seven year period it has maintained the Annex as a proposed but unadopted rule.

[1] Brief for Florida Power & Light Company in Opposition (FPL Br.), p. 4, 8-9; Federal Memorandum in Opposition (U.S. Mem.), p. 5-6, *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 834-36 (1973); *Offshore Power Systems* (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, (1978).

> Whether an administrative agency may give binding effect in licensing proceedings to interim guidance set forth in a proposed but unadopted rule,

is, petitioners submit, an important question of federal law under the Administrative Procedure Act and one which this Court should address and resolve. Certainly nothing in *Columbia Broadcasting Systems, Inc., v United States,* 316 U. S. 407 (1942), or in *Pacific Gas & Electric Co. v. Federal Power Commission,* 506 F. 2d 33 (D.C. Cir. 1974), FPL Br. p. 12, suggests that such procedure is permissible.[2]

Both respondents rely upon *Shoreham and Offshore Power Systems* to support their alternative contention that the Commission's threshold rule has been properly developed through adjudication. Petitioners agree that these are the central decision, but submit that they illustrate the converse.

Offshore Power Systems is central for two reasons. First, the Appeals Board explicitly ruled that the proposed Annex (not

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[2]Both respondents suggest the proposed rule should be characterized as a "general statement of policy" exempt from rule making requirements under § 553 (b) A) of the APA (App. 10. 12a). (FPL Br. pp. 11-12; U.S. Mem. p. 6 n. 8.) Both *Columbia Broadcasting,* 316 U.S. at 417, and *Pacific Gas,* 506 F. 2d at 39, note the significance of the characterization given the statement by the agency, here cast in the form of a proposed rule. More importantly, *Pacific Gas,* accurately describes the limits on the effect which an agency may give to a general statement of policy.

> A general statement of policy, on the other hand does not establish a "binding norm" . . . The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. ***An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive policy by announcing binding precedent in the form of a general statement of policy.*** (506 F. 2d at 38-39; ***emphasis added; footnotes omitted.)***

Clearly, the NRC has used the Annex to avoid its responsibility to present evidence supporting the conclusion that the probability of occurrence for a class 9 accident is so low that the environmental risk need not be considered, even though the conceded magnitude of the consequences is extraordinary.

Shoreham or its other prior decisions) represented a binding determination by the Commission that precluded the Commission staff from offering any evidence in licensing proceedings with respect to the probability of occurrence of class 9 accidents. The Appeal Board recognized that the Annex, not the cases, had established a rule which barred the Commission itself from developing an evidentiary record in licensing proceedings from which the fact of probability might be assessed. Second, the Appeal Board decision explicitly recognized that, although in its view the proposed Annex established a low probability of occurrence, in some circumstances the magnitude of the consequences of class 9 accidents might be so great that consideration of the risk to the human environment was required.[3] Because the Appeal Board ruled that the Annex, rather than the decisions, established the rule, it could only achieve the result obtained there by distinguishing floating power plants from land based power

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[3]Respondents' suggestion that *Offshore Power Systems* merely reaffirms a "reasoned and consistent view" of the Commission that class 9 accidents may not be considered with respect to land based plants (U.S. Mem. p. 6n.9; FPL Br. p. 23) misstates the Commission's position and its practice. The Commission staff has now publicly disclosed that it considers class 9 accidents in its own environmental review of proposed land based sites and has used that consideration to effectively compel selection of alternate sites. In its brief to the Commission in *Offshore,* the staff disclosed:

> "D. THE EVALUATION OF CLASS 9 ACCIDENTS IN THIS CASE IS IN ACCORD WITH STAFF INFORMAL LICENSING REVIEW PRACTICE . . . (P)ast Staff licensing practice has not always been entirely consistent . . . (T)he Staff had taken the opposite position in the Newbold Island case that the site was unacceptable because of concerns regarding impact of class 9 accidents on nearby high population areas. Also, the staff's NEPA review of the *Clinch River Breeder Reactor* included specific considerations of class 9 accidents risks (both probability and consequences.)

NRC Staff's Brief in Support of Affirmative Finding on Certified Question (July 12, 1979), p. 44-45, *Offshore Power Systems* (NRC Docket No. STN 50-437); *footnotes and citations omitted.* The effect of the staff's non-record review was brought out in the proceedings below. *See,* letter dated October 5, 1973 from AEC Director of Regulation to Public Service Electric and Gas of New Jersey advising applicant that the Final Environmental statement for Newbold Island Nuclear Power Plant would be unfavorable because of dangers to population centers 30 miles distant and recommending applicant resubmit application for alternate site. Record, p. 32, 490-91.

plants and holding the Annex had not been intended to apply to the former.[4]

Petitioners did not and do not contend that the adjudicatory process could not have been used to determine probability of occurrence and to adopt a threshold rule; they did, and do, submit that it has not been properly done.[5] In each of this Court's decisions approving the development of rules through the adjudicatory process, the rule developed or to be developed was or was to be the product of an adjudication of the facts upon which the rule rested, culminating in the agency's articulation of the reasons for which it was adopted. *See, NLRB v. Bell Aerospace Co.*, 416 U. S. 267 (1974); *NLRB v. Wyman Gordon*, 394 U. S. 759 (1969); and *SEC v. Chenery Corp.*, 332 U. S. 194 (1947) FPL Br. p. 12; U. S. Mem. p. 6. Had the commission ever placed into the record in licensing proceedings evidence which supported a conclusion with respect to the probability of occurrence of the specific types of class 9 accidents, a rule such as that applied here might or might not have been adopted. But by urging that repeated application in licensing proceedings of a proposed but unadopted rule constitutes an acceptable procedure for establishing an adjudicative rule without development of an evidentiary record supporting the critical factual determination upon which the rule depends, respondents only illustrate the importance of the federal question presented. Nothing in the Act or in this Court's decisions can be fairly read as authorizing such a procedure.

II.

Both respondents concede, as they must,[6] that the proposed rule has been applied as the basis for the "threshold" rule which has

[4]The apparent similarity between the consequences of a core melt accident at a plant on a narrow barrier island in the Atlantic Ocean near the Gulfstream and those the staff postulates for floating power plants (in contrast to those apparently postulated for land based plants) make the Appeals Board's change in position especially noteworthy here. (Pet. p. 20 n. 23; *c.f.* FPL Br. p. 13 n.23' U.S. Mem. p. 6 n.9.) The Commission provided no reasoned basis for distinguishing Hutchinson Island here from floating power plants.

[5]The United States simply misstates petitioners' contention. (U.S. Mem. p. 5; Pet. pp. 12-13.)

[6]FPL Br. pp. 6-9; U.S. Mem. p.3.

precluded intervenors from introducing evidence in licensing proceedings to show the specific environmental consequences[7] that would result from a core melt or any other type class 9 accident, and they suggest that the Commission may properly continue to so apply this rule unless and until an intervenor can do what the Commission itself has been unwilling (or unable) to do -- namely, produce an evidentiary record from which a factual conclusion with respect to the probability of occurrence for such an accident can propery be drawn.[8]

> Whether NEPA imposes an obligation on the Commission to determine through reviewable agency action the probability of occurrence for various types of nuclear accidents before it can refuse to consider the environmental risks associated with a class of nuclear accidents, the magnitude of whose environmental consequences are postulated to be catastrophic,

remains, petitioners submit, an unresolved and important question

[7]Respondent FPL suggests that since petitioners offered no proof with respect to the probability of occurrence of a class 9 accident, they "distort the situation" when they assert that the Licensing Board's ruling deprived them of the right to introduce evidence. (FPL Br. p. 9 n.20.) By their contention petitioners sought not only to compel the Commission to establish the probability of occurrence but also the right to introduce evidence showing the specific environmental consequences of various types of class 9 accidents that might result if a nuclear plant were built on a populous barrier island in the Atlantic Ocean adjacent to the Gulfstream. c.f. *Offshore Power Systems*, supra n 1 and 5.

[8]Respondents tacitly concede the determination must in the first instance be made by the agency. To bolster their conclusion that it has been made, they cite decisions by the courts of appeal reciting the "low probability" and relying upon a 1957 Commission study (FPL Br. pp. 4-5, 9; U. S. Mem. p. 5 n.6) Obviously the courts of appeal cannot arrogate to themselves responsibility for making this determination.

The fact that the court of appeals below and both respondents here found it necessary to rely upon that court's 1976 decision in *Lloyd Harbor Study Group, v. NRC*, No. 73-2266 (D.C. Cir. Nov. 9, 1976) (App. p. 4a; FPL Br. p. 9; U.S. Mem. p. 2 n.2) to avoid the problem posed by the 1974 Rasmussen Study (Pet. pp 7-8 notes 8 and 10) supports petitioners suggestion that the petition be granted and the judgment below be vacated and remanded for further consideration (Pet. p. 20 n.24). The court of appeal's unpublished decision here relies heavily upon another unpublished decision, *Lloyd Harbor*, in clear violation of that court's own rules prohibiting use of unpublished decisions as precedent. (*See*, Rules 13(c) and 8(f) of the *General Rules of the United States Court of Appeals for the District of Columbia Circuit*, 28 U.S.C.) However the issue here is to be decided, it should be authoritatively resolved in a decision that provides guidance for the future.

of federal law that this Court should address.[9]

Respondents attempt to analogize the Commission's failure to consider the environmental risk posed by nuclear accidents with the Commission's refusal to weigh the energy conservation alternative considered in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); FPL Br. pp 10-11; U. S. Mem. p. 4-5. [10] The relevance of nuclear accidents to a NEPA determination of the risk posed to the human environment is apparent and was conceded to be so by the Commission in the 1971 Annex and in all subsequent licensing proceedings. The relevance of energy conservation as an alternative to increased energy capacity in the environmental cost benefit analysis required by NEPA was not quite so apparent in 1972; nor does energy conservation have the propensity for substantial impact on the human environment posed by a catastrophic nuclear accident. (See Petition, pp. 17-18 n.22.) This petition does not challenge a Commission determination whether various types of nuclear accidents are probable or

[9]Respondent FPL suggests the Court should defer consideration of the issues raised by the petition because the legislative and executive responses to Three Mile Island indicate the substantive issue is being seriously reconsidered. (FPL Br. p. 11 n.21.) The petition does not ask this Court to consider the substantive questions; it poses only the procedural issues . . . whether NEPA mandates agency consideration and whether the required consideration must be done through agency action, affording the public and intervenors the procedural rights prescribed by the APA. These are issues squarely presented by this petition which this Court should resolve now in order that any substantive decisions made by the legislative or executive branches of government may be properly implemented. More than 70 plants have been licensed for operation; others for construction. The question of what consideration is to be given the environmental consequences of a core melt accident has been deferred too long already.

[10]Respondents briefs might also be construed as suggesting an analogy between petitioners' failure to offer probability of occurrence evidence (FPL Br. pp. 10-11; U.S. Mem. pp. 4-5) and the refusal of intervenors in *Consumer Power Co. v Aeschliman* to offer any support for their contention on energy conservation. *Vermont Yankee*, 435 U.S. at 553-54. The Licensing and the Appeal Boards in these proceedings have had frequent occasion to note the quality of the effort and the evidence offered by petitioners (p.29b, p.36b, p.60b c.f. Morgan at pp. 103b -112b, Sep. App.) and have felt compelled to note the significant contribution petitioners have made. (p.138b, 143b Sep. App.) The Appeal Board has also had occasion to comment less favorably upon the quality and fullness of respondent FPL's presentations and indeed upon that of the Commission staff. (p.79b, 86b-87b, 91b-93b, 97b, 103b, 143b Sep. App.) Any suggestion that petitioners here have failed to litigate fully and effectively those contentions they were permitted to litigate is unsupportable.

improbable; it challenges the Commission's failure to make the determination at all.[11]

III

The Commission refuses to consider the consequences to the human environment of any nuclear accident which might result in a core melt and rupture of the containment facility. The Commission in its decision and each respondent here has offered only one basis to justify this refusal . . . the view that the probability that such an accident will occur is so low as to render the possibility incredible. It is this purported fact the Commission suggests as the sole predicate for its proposed substantive rule excusing consideration. This is the factual predicate upon which the Licensing and the Appeal Boards' procedural "threshold rule" rests. But neither respondent cites any agency action in which this "fact" has been determined.

Recent events as well as the Commission's own studies suggest a core melt accident may be less than incredible. Certainly, the credibility or lack thereof is not a fact of which this Court or any court should take judicial notice. Certainly, it is not a fact which Congress intended this or any court to determine itself. But by arguing that a "rule of reason" excuses consideration in the absence of any agency action (FPL Br. pp. 6, 9-10; U. S. Mem. pp. 4-5), this is precisely what respondents invite the Court to approve. The invitation should be rejected.

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[11]Although the treatment afforded accidents defined in the Annex as classes 1 through 8 is not raised in this petition, petitioners do not concede that the classes are legally valid. (U.S. Mem. p. 4 n.5). The Annex has not been adopted and does not constitute agency action.

The Commission has refused to adopt any of its own studies on accidents and indeed has repudiated the risk assessment portions of the Rasmussen Study. (Pet. p. 7 notes 9 and 10; p. 8 n. 12.) Rasmussen, the Commission's most complete study, projects that a Class 9 accident may reasonably be expected to occur. (*Id.* p. 9.) Events at Three Mile Island lend credence to this conclusion. The failure of the Commission to adopt the Rasmussen Study, when published in 1974, or any of its earlier studies (Pet. p. 7 n. 8) as a basis for licensing decisions corroborates petitioners' suggestion that the Commission has no technically defensible scientific basis for concluding Class 9 accidents are "incredible." (Pet. pp. 6-7.) Application of a "rule of reason" compels the opposite conclusion. "Reason" suggests Congress intended to compel consideration of probabilities such as these when it enacted NEPA and intended that consideration be achieved in accordance with the requirements of the APA.

CONCLUSION

The petition and the responses identify important issues arising under the APA and under NEPA. But the abstract legal discussion should not be permitted to obscure the underlying concern. If the fuel core of a nuclear reactor melts, it will start an irreversible chain reaction that no presently designed facility can contain. The radioactive core will melt through the floor or cause a steam pressure explosion or both. Then the radioactive genie will be out of the regulatory bottle. This petition asks the Court to determine whether and by what procedures the Commission must consider the threat to the human environment posed by that possibility. Surely the members of the human environment are entitled to that determination. Surely, Congress intended that the public be given full disclosure of the bases upon which any administrative decision to ignore these risks is justified. The petition does not ask the Court to strike the balance; it asks only that the Court review whether it has been fairly struck at all.

The petition should be granted.

Respectfully submitted,

MARTIN H. HODDER
1131 N.E. 86th Street
Miami, Florida 33138
(305) 751-8706

TERENCE J. ANDERSON
University of Miami School of Law
Coral Gables, Florida 33134
(305) 284-2253 or 2971

Attorneys for Petitioners.